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SUPREME COURT, U.S.

No. 77-6949

ORIGINAL COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

ROBERT DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

REPLY TO THE MEMORANDUM FOR THE UNITED STATES

DANIEL J. SEARS
Federal Public Defender
District of Colorado
Denver, Colorado 80294

IN THE SUPREME COURT OF THE UNITED STATES

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REPLY TO THE MEMORANDUM FOR THE UNITED STATES

COMES NOW the Petitioner, Robert Dunn, by and through his court appointed counsel, Federal Public Defender Daniel J. Sears, and pursuant to Rule 24(4) of the Supreme Court Rules, hereby replies to the Memorandum for the United States as follows:

1. Counsel for the Respondent has erred in his assessment of the "Question Presented" in his Memorandum for the United States in that Petitioner did not subsequently give "contradictory non-immunized testimony in a judicial proceeding" as alleged. See page 1, Memorandum for the United States. This statement assumes several incorrect conclusions which are not supported by the record. As alleged in the Indictment, the defendant testified at a June 16, 1976, session of the Federal Grand Jury sitting at Denver, Colorado. Dunn initially claimed his Fifth Amendment privilege against self-incrimination, was taken before a Federal District Judge and upon application of the United States, was ordered to testify truthfully before the Federal Grand Jury under an order of use immunity pursuant to Title 18 United States Code, Section 6002. Dunn reappeared before the Grand Jury and testified that Musgrave had given him drugs in the penitentiary, that he had made telephone calls to Kate Blehm during which code words for drugs were used, and that Musgrave had given him a list of chemicals that he (Musgrave) wanted. On September 30, 1976, in Musgrave's attorney's office, Dunn recanted his Grand Jury testimony and made statements concededly inconsistent with his earlier Grand Jury testimony. On appeal, the appellant argued, and the Tenth Circuit Court of Appeals ruled, that the proceedings in the private attorney's office were not ancillary to a U. S. Court or Grand Jury proceeding as required by 18 U.S.C. §1623. The June 16th appearance before the Federal Grand Jury and the September 30th appearance in the attorney's office were the only two proceedings alluded to in the Indictment. (See Indictment attached hereto.) The declarations made during these two sessions were the only declarations alleged to be inconsistent under Section 1623(c). A judicial proceeding did take place on October 21, 1976, concerning an evidentiary hearing on a motion to dismiss the Indictment in United States vs. Musgrave, Criminal Case No. 76-CR-155. Statements in this proceeding, however, were not incorporated

into the Indictment and alleged to be inconsistent with declarations earlier made. Furthermore, Dunn's statements at the hearing cannot be characterized as inconsistent with his earlier Grand Jury testimony. He merely stated that "[p]ossibly ten percent" of his Grand Jury testimony was truthful. Such a statement cannot be deemed to be inconsistant with earlier testimony concerning Musgrave's giving him drugs in the penitentiary, his making phone calls to Kate Blehm during which code words for drugs were discussed, and Musgrave's giving him a list of chemicals. The only possible use of such a statement that his Grand Jury testimony was largely false would be under Rule 801 of the Federal Rules of Evidence, but only if the government had attempted to prove that Dunn's June Grand Jury testimony was false. The government attorney, however, specifically declined to proceed on such a theory and the Court never submitted it to the jury for its consideration. The sole theory presented throughout the trial was one of inconsistent declarations under Section 1623(c) based on the June 16th Grand Jury appearance and the September 30th statements in the attorney's office. The conviction under §1623(c) cannot be sustained.

2. As abhorrent as Dunn's conduct may have been, the Tenth Circuit erred in sustaining his conviction on the basis of declarations not charged in the Indictment. As argued above, the declarations made at the October 21st evidentiary hearing do not qualify as inconsistent declarations. Notwithstanding, the trial court and the appellate court

attempted to assist the government in "bootstrapping" the September 30th proceeding in the attorney's office into one ancillary to a U. S. Court or Federal Grand Jury proceeding. 18 U.S.C. §1623 provides for a violation where "the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false . . ." The inconsistent declarations all must be made in proceedings before or ancillary to any court or Grand Jury of the United States. Though the government alleged in paragraph 5 of each respective Count that the September 30, 1976, proceeding was ancillary to United States vs. Musgrave, et al., Criminal Case No. 76-CR-155, the Tenth Circuit sustained Petitioner's argument that it did not qualify as such. The trial court and the appellate court, however, looked outside the Indictment to the evidentiary hearing in U. S. District Court to sustain the conviction under Section 1623(c). This action tended to amend the Indictment in violation of the holding in Stirone v. United States, 361 U.S. 212 (1960). Though the Tenth Circuit opined that the defendant should have contemplated the admission of such statements, the defendant was not confronting the mere introduction of unexpected evidence, he was asked to confront charges not alleged in the Indictment. The record is replete with the government's repeated representations from bill of particulars through closing arguments that it was proceeding on the declarations alleged to be inconsistent between the June 16th and September 30th proceedings. Yet the Tenth Circuit Court of Appeals found it

appropriate to sustain the conviction on the basis of what it deemed to be inconsistent declarations at the proceeding in U. S. District Court not mentioned in the Indictment. Respondent follows the same line of reasoning in page 3, Memorandum for United States, where he alleged "[t]he indictment charged, under the theory of prosecution authorized by subsection (c) of Section 1623, that various statements made during petitioner's grand jury testimony were inconsistent with statements made under oath to Musgrave's attorney and adopted at the subsequent court hearing 'to the degree that one of them is necessarily false * * *'". (Emphasis added.) If Dunn had gone through each of his declarations before the Grand Jury and testified inconsistently at the subsequent court hearing to each one, an inconsistent declarations prosecution might withstand attack. But his mere statement in a judicial proceeding that his earlier Grand Jury testimony was largely false implying that his subsequent inconsistent statements in a non-judicial proceeding were largely true, cannot justify a conviction under Section 1623(c).

3. Respondent at page 11, Memorandum for the United States, concedes the correctness of the results in Berardelli, Housand and Patrick, on the one hand, yet contends that they are not inconsistent with the result in the instant case. At the same time, however, he seems to indicate that the courts in each of those respective cases "would not have upheld petitioner's convictions". See page 10, Memorandum for the United States. The facts in the present case are

distinguishable from Patrick, Housand and Berardelli, but the principle that testimony compelled under an order of immunity may not be used to establish the corpus delicti in an inconsistent declarations prosecution under Section 1623(c) is as applicable to Dunn as it was to the defendants in each of those cases. The order granting Dunn immunity prior to his testimony before the Federal Grand Jury is absolute until and unless the government can bring him within an exception to 18 U.S.C. Section 6002. His testimony compelled under an order of immunity cannot be used against him except in a "prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. Section 6002. An inconsistent declarations prosecution under Section 1623(c) does not fall within the exception unless the government is able to establish that the immunized witness violated the order by testifying falsely or refusing to testify. The phrase "otherwise failing to comply with the order" in Section 6002 must be read in conjunction with the prior words "perjury" and "false statement." Under the doctrine of noscitur a sociis, "otherwise failing to comply with the order" suggests that the order must be violated as a prerequisite to using the testimony in a perjury or false statement case. Unless it could have been shown that Dunn violated the order and testified falsely, his immunized testimony should not have been used against him. Contrary to Respondent's contentions, this rule must remain absolute regardless of whether the witness subsequently testifies voluntarily or under compulsion.

4. Petitioner respectfully requests that certiorari be granted and that his case be considered separately from the pending action in New Jersey vs. Portash. Though the two cases may contain similar issues, it appears that Petitioner's case is distinguishable. First of all, Dunn's case concerns the Court's expansion of the four corners of the Indictment. Secondly, it appears that the Portash case does not deal with the direct issue of whether immunized testimony can be used to establish the corpus delicti in an inconsistent declarations prosecution under Section 1623(c). Third, the record in Dunn contains corroborative evidence independent of his recantations that his forced immunized testimony was, in fact, truthful.

In Patrick, the defendant refused to testify on a claim of Fifth Amendment privilege despite immunization under 18 U.S.C. §6002. Patrick was convicted of civil contempt on the basis that his claim of privilege was not valid. The trial court ruled, and the appellate court affirmed, that Patrick's immunized testimony could not be used to establish the corpus delicti in an inconsistent declarations prosecution under 18 U.S.C. §1623(c). Certiorari was denied in the case. Dunn now has fully realized the fears expressed by Patrick. The integrity and confidence in ordered immunity and compelled testimony may not remain intact if this conviction is allowed to stand. The reasoning in Patrick, Housand, Berardelli, and Apfelbaum cannot be reconciled with the Tenth Circuit decision in Dunn.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court not hold this matter in abeyance and grant certiorari for review of the conviction below.

Respectfully submitted,

DANIEL J. SEARS
Federal Public Defender

CERTIFICATE OF SERVICE

I certify that I personally delivered and/or placed in the United States Mails copies of the REPLY TO THE MEMORANDUM FOR THE UNITED STATES addressed as follows, on the 21st day of November, 1978.

Office of the Solicitor General
Department of Justice
Washington, D. C. 20530

Joseph F. Dolan, Esq.
United States Attorney
District of Colorado
330 U. S. Courthouse
1929 Stout Street
Denver, Colorado 80294

M. Scarborough

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

United States of America,

Plaintiff,

v.

ROBERT DUNN,

Defendant.

76-CR-322

CRIMINAL CASE NO. _____

INDICTMENT

18 USC §1623

COUNT I

The Grand Jury charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count I, in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether ROBERT DUNN had ever assisted Phillip Musgrave in smuggling controlled substances into the Colorado State Penitentiary through Steve and Debbie Strammel.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingl declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did you assist him (Phillip Musgrave) in getting stuff smuggled into the penitentiary?

A. Yes, sir, once.

Q. Was that with the Strammels?

A. Yes, sir.

5. At a time subsequent to ROBERT DUNN'S declaration as aforesaid, that is, on September 30, 1976, while under oath as a witness in a proceeding ancillary to United States v. Musgrave, et al., Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. What about Steve Stramel. Did you ever know Steve Stramel?

A. Uh not knowing, by being introduced to him. I seen him at one time.

Q. Where did you see him?

A. Uh him and a girl Debra, Debbie uh came up to see Phillip and I seen him across the visiting room. I was visiting with some friends of mine that came up from Denver and I just seen him from a distance. I. . .I couldn't even. . .I doubt if I could recognize him.

Q. You never had any conversation with either Steve. . .

A. No sir.

Q. . . .or his girlfriend or wife, Debbie?

A. No.

Q. Did you ever smuggle in drugs to the institution from Steve and Debbie?

A. No sir.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count I were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT II

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count II, in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether Phillip Musgrave ever gave ROBERT DUNN a controlled substance while both were incarcerated in the Colorado State Penitentiary.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did he (Phillip Musgrave) have drugs there in the penitentiary?

A. All the time.

Q. Did you work with him or for him in the penitentiary?

A. I was a gopher boy; I went for pop, commensary and held his stash for him.

Q. What did you get in return?

A. A fair amount of speed every time he'd cop.

Q. Every time he had some, he'd give you some?

A. Oh, yes, sir. I don't know whether it was because he liked me, because he wanted to do it, or because he was paranoid if he didn't do it, something bad would happen at first.

5. At a time subsequent to ROBERT DUNN'S declaration as aforesaid, that is, on September 30, 1976, while under oath as a witness in a proceeding ancillary to United States v. Musgrave, et al., Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. During the time that you were in the penitentiary uh did Phillip Musgrave ever give you any drugs of any sort?

A. No sir, he didn't.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count II were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT III

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count III in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether ROBERT DUNN made telephone calls to Kate Blehm regarding drugs from the Colorado State Penitentiary.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did you make some calls for Musgrave to Kate?

A. Yes, sir, I did.

Q. Did he give you the phone number?

A. Yes, sir, both of them.

Q. He gave two phone numbers?

A. One where she worked at the--881-2273, at the Rustic Resort and at home, 881-2278, and that's in Belleview. I may have them numbers mixed up, but I'm not sure. It's been quite a while since I called the number.

Q. So you would call and give messages to Kate also in addition to Musgrave?

A. Yes.

Q. Did you have any code names you were supposed to use?

A. He was one, Jimmy Heath was two and I was three.

Q. Did you talk about speed or did you use another word?

A. Bull shit, excuse me.

Q. That was the code name for the speed?

A. Yes, sir.

5. At a time subsequent to ROBERT DUNN'S declaration as aforesaid, that is, on September 30, 1976 while under oath as a witness in a proceeding ancillary to United States v. Musgrave, et al., Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. Now who is Kate?

A. Kate Blehm.

Q. And who was she?

A. Phil's uh girl.

Q. Alright.

A. Uh he asked me if I would call her and ask. . .and have her bring up a book, you know, like a tarot card book that uh shows you how to read 'em and how to uh understand 'em. And uh to be sure and come up and see him. Uh that was it.

Q. Was there any mention or any code with reference to drugs in any conversation with Kate Blehm?

A. No sir.

Q. Did Phillip tell you what to say to her insofar as code which might involve speed or the smuggling of drugs into the institution?

A. No sir. All he said was see. . .tell her to get me uh a tarot card book and to be sure and come up and see him.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five(5) of this Count III were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT IV

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count IV, in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether Phillip Musgrave ever gave ROBERT DUNN a list of chemicals useful in the manufacture of methamphetamine.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. During February of '76, did you see Musgrave again and find out--did he say that he still wanted any of those chemicals?

A. Yes. I was living out on West 58th Avenue in Arvada, 14500 West 58th. It was a 10-acre farm that me and a friend of mine was renting--me and a friend of mine and his wife, and it was pretty excluded, had a barn. And the guy that I was living with, he worked out at Continental Oil also and he came into town looking for me on a Monday and I had just had some teeth pulled and I didn't feel like messing with anybody so I just started spacing him out--just not meeting when I was supposed to, and he chased me for three and a half days until he finally caught up with me.

Q. What did he want when he caught up with you?

A. Propenyl, methylamine. He wrote out on an envelope--a big manilla envelope that I still have--all the chemicals that are needed.

Q. Musgrave wrote this out on the envelope?

A. Yes, sir.

5. At a time subsequent to ROBERT DUNN'S declaration as aforesaid, that is, on September 30, 1976 while under oath as a witness in a proceeding ancillary to United States v. Musgrave, et al., Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. Did you ever at any time ever get a list of chemicals from Mr. Musgrave for any purpose?

A. No sir.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five(5) of this Count IV were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT V

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count V in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether Edward Perkins had ever delivered methamphetamine to ROBERT DUNN.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did you have a meeting with Perkins some time?

A. He came down one night. Cebe sent me down a half ounce as a bonus for the girl I got him, that Kris.

Q. Was this in November or December of '75?

A. Yeah.

Q. Okay.

A. And Eddie Perkins come down and delivered it.

Q. Delivered it to you?

A. No, he come in kind of funny. He come in the front door of the apartment, said it was on the outside window sill of the bedroom and it was one of these--it was a basement where you couldn't roll the windows and they were roll-type windows and you couldn't roll them all the way out and I couldn't get my arm out there and Charlotte, my girl at the time, couldn't get her arm out there, so he stuck his arm out there and got it.

Q. And gave it to you?

A. Yes, sir, and then he did about six 180 degree turns and out the door.

5. At a time subsequent to ROBERT DUNN'S declaration as aforesaid, that is, on September 30, 1976, while under oath as a witness in a proceeding ancillary to United States v. Musgrave, et al., Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. You've met Eddie Perkins once or twice?

A. Uh twice.

Q. And how long did each of those meetings or uh social events take place?

A. With Mr. Perkins the first time, it was about three minutes. In other words, he came in and delivered a message you know, Phillip was in town and if I wanted to see and meet him for dinner. And the second time was at uh Aurora, a friend of mine's house. Went out to uh. . .I went out to sell a guy some tires and Eddie was there. Uh somethin' happened to his car. Oh, his wife or his ex-wife took his car and he didn't have any transportation. And he was waitin' for a ride and I. . .that was no more than hello and goodbye.

Q. Did you ever have any business dealings of any sort with Mr. Perkins?

A. No sir.

Q. Did you ever buy any speed from him?

A. No, but I'd sure like to sell him some.

Q. Did you sell him any?

A. No.

Q. Alright. Did you ever discuss speed with Mr. Perkins?

A. No sir.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count V were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

A TRUE BILL:

Gilbert E. Bernard
Foreman

JAMES L. TREECE
United States Attorney

Edward W. Nottingham
BY: EDWARD W. NOTTINGHAM
Assistant United States Attorney